

LIM GEOK CHING & ANOR. v. PUBLIC PROSECUTOR *

[App. Crim. Juris. (Callow, J.) January 5, 1949]

[Malacca — Criminal Appeal No. 21 of 1948]

Opium and Chandu Proclamation, 1946, ss. 3(1) and 17—Opium and Chandu Rules, Rule 11—Possession of Chandu—Knowledge of possession—Forfeiture of motor lorry—Opportunity to owner to show cause.

This was an appeal against the conviction of the appellant for possession of chandu and against the order of forfeiture of the motor lorry, in which the chandu was found. It appeared that the first appellant was the lorry cleaner who had the general care and charge of the lorry and had the key of the locker in which the chandu was found. The second appellant was the lorry driver. At the trial the owner of the lorry was not given an opportunity to show cause why the lorry should not be forfeited.

Held, (1) that there was no evidence that the second appellant had possession, custody or control of the chandu and therefore his conviction must be set aside; (2) that there was evidence as against the first appellant, from which the learned District Judge could infer possession and, on the facts, his conviction was correct; (3) that as the owner of the lorry had not been given an opportunity of showing cause why the order for forfeiture should not be made, the order for forfeiture must be set aside †.

Cases referred to :—

- (1) *Tan Shu En & Anor. v. Public Prosecutor* (1948) M.L.J. 196 (C.A.).
- (2) *Koay Ban Siew v. Public Prosecutor* (1948) M.L.J. 54 (C.A.).
- (3) *Cheng Kee Huat & Anor. v. Public Prosecutor* (1948) M.L.J. 53.
- (4) *Tan Lian v. Rex* (1947) M.L.J. 196.

CRIMINAL APPEAL.

J. A. Nathan for the 1st appellant.

R. H. V. Rintoul for the 2nd appellant.

W. Buhagiar for the Public Prosecutor.

Cur. Adv. Vult.

Callow, J. :— This is an appeal from the District Court, Malacca, against the convictions and sentences of two years rigorous imprisonment, together with the order of forfeiture of lorry No. M. 1067, imposed on the 26th October, 1948, for possession of eight slabs of opium, contrary to section 3(1) of the Opium and Chandu Proclamation (No. 49 of 1946).

On the 2nd October, 1948, the lorry was stopped at Merlimau Police Station and in a secret compartment

reached through the tool box was found a considerable quantity of opium described in the charge as eight slabs and appearing to me as upwards to some ten pounds.

This Court viewed the lorry. A large locker or tool box has been constructed on either side of the vehicle to the rear of the cab and under the body or flat of the lorry. Each locker has a false side or back behind which is room for a quantity of small articles to be secreted and conveyed. Only careful scrutiny of these lockers would disclose the presence of the hidden places. If the lorry is loaded access can only be through the locker door and then by moving a fitted board or panel; if unloaded, entrance can also be obtained by moving a board from the flat of the lorry. The key to the locker was at all material times in the exclusive possession of the 1st appellant.

There were four persons travelling on the lorry, and all were charged with the possession of this opium. After preliminaries the prosecution offered no evidence against two of the accused and the trial proceeded against the present appellants. The 1st appellant described himself as the lorry cleaner, but according to the owner (3rd prosecution witness) he had the general care and charge of the vehicle; the 2nd appellant was the driver only.

The grounds of appeal argued were similar, both submitted that the Court below erred in ordering the forfeiture and that the sentences were excessive. The 1st appellant also submitted :—

"2(b). That the learned District Judge erred in holding that your Petitioner had not discharged the onus case by section 18(1) of the said Proclamation of proving that your Petitioner had no knowledge or reason to know of the contents (other than tools and patent medicines) of the tool box in the Motor Lorry M. 1067 (Exh: 'P')."

and with the acquiescence of the Deputy Public Prosecutor and the leave of the Court the 1st appellant adopted and argued ground 2 of the petition of the 2nd appellant. This reads :—

"2. Your Petitioner is dissatisfied with the Judgment on the ground that the Learned District Judge erred in Law in holding that your Petitioner had custody or control over the Opium forming the subject matter of this Charge."

The 2nd appellant in addition to his own ground 2 (*supra*) submitted :—

"3. Your Petitioner is further dissatisfied with the Judgment on the ground that the Learned District Judge erred in Law in holding that Section 18(1) of Proclamation No. 49/46 cast any onus on your Petitioner."

"4. Your Petitioner is further dissatisfied with the Judgment on the ground that the judgment is against the weight of evidence in that there was no evidence to prove that the second Appellant knew that Opium was in the Motor Lorry."

* The Headnotes herein were published in (1949) M.L.J. 98.
— Ed. M.L.J.

† This was confirmed by Pretheroe J. in *Public Prosecutor v. Lim Geok Cheng & Anor.* (1949) M.L.J. 154. — Ed. M.L.J.

At the opening of the appeal the learned Deputy Public Prosecutor intimated that he was unable to support the conviction against the 2nd appellant.

It would certainly appear from perusal of the record that following the case of *Tan Shu En & Anor. v. Public Prosecutor*⁽¹⁾ the mere discovery of the opium was insufficient by itself to hold applicable the provisions of section 18 of the Proclamation.

It is iteration to set out the latter part of the judgment in the *Tan Shu En case*⁽¹⁾, and with respect I cannot but subscribe to it, particularly in view of the amendment to section 3 (2) of the Proclamation placing the onus of disproving possession when opium is found on any person's premises.

It seems to me that vehicles being peculiarly excluded it is useless to prosecute those travelling in a lorry in which opium is found unless possession can be directly connected with a definite person or persons. The discovery of opium in a vehicle is not in itself enough.

In this case I think it very likely that the 2nd appellant had full knowledge of the conveyance of this opium in the secret hiding place, but knowledge alone is not enough, there must be evidence of possession, custody or control, and I agree with the learned Deputy Public Prosecutor that in view of the fact that the locker key was never in the possession of the 2nd appellant there is insufficient on the record to find any of these postulates against the 2nd appellant.

The lack of such evidence precludes the operation of section 18 of the Proclamation. As Mr. Rintoul for the 2nd appellant succinctly put it, the onus cannot be placed upon an accused until possession is first established. I am fully conscious of the finding of fact by the Court below, but the learned District Judge had not at the time of trial the advantage of reading the *Tan Shu En*⁽¹⁾ judgment.

I therefore allow the appeal by the 2nd appellant.

But the case against the 1st appellant is on very different ground. He alone held the key to the locker which contained the hidden compartment in which the opium was found. He had general control of the vehicle, and there was ample evidence for the learned District Judge to find that the 1st appellant had custody and control of the opium. As the 1st appellant said in evidence "These two boxes (referring to the lockers) . . . are always under my control".

Thus there being evidence by which the learned District Judge could infer possession, the prosecution were relieved from proving the further requisite as to

ownership and knowledge (section 18 of the Opium and Chandu Proclamation), and the Court below found no adequate defence. I think there can be no doubt that the 1st appellant knew full well of the presence of this opium in the secret hiding place of which he held the key of ordinary access.

The defence that the opium had been planted was rejected, and in view of the contradictions I find no reason to disagree with the grounds of judgment as regards the 1st appellant that his evidence was completely untrue, and that he was guilty of the offence charged.

The quantity of opium found was large, and the circumstances revealed were enough to justify the conclusion that traffic in the drug was being effected.

The appeal against conviction is dismissed, and I find no sufficient reason to interfere with the sentence imposed.

I have been much exercised over the order of forfeiture. Have the appellants, neither owning nor having any interest in the lorry beyond employment, any *locus standi*?

On the other hand the owner of the lorry not being a party to the case, albeit he was the 3rd prosecution witness, had no right of appeal (*Koay Ban Siew v. Public Prosecutor*⁽²⁾). Is it just, and what is equally important does it appear just, to order forfeiture of a man's property when he is not a party to the case, and when in consequence of such position he cannot appeal?

It was pointed out during argument that while section 179 of the Customs Consolidation Act, 1876, demands forfeiture, and section 33 of the Chandu Revenue Ordinance (Cap. 223) compels forfeiture after discretionary seizing, the word "shall" being used in each instance, section 17 of the Opium and Chandu Proclamation makes both the seizing and the forfeiture discretionary.

Nor in the Opium and Chandu Proclamation is there any procedure whereby a person whose property is confiscated may intervene and proceed as in section 108 of the Customs Enactment, 1936.

It is true that rule 11 of the Opium and Chandu Rules gives power to the Controller to restore to the owner anything forfeited, and presumably procedure by the owner should be by way of petition. But once a Court has ordered forfeiture it might be unhappy and embarrassing for the Comptroller to restore the property.

Here the learned District Judge had the owner of the lorry before him as a witness for the prosecution, and I am sure the Court below gave close attention to his evidence and demeanour before ordering forfeiture. But in his grounds of judgment the District Judge gave his reasons as follows:—

"It is clear from the evidence of the owner of the lorry (P.W.3) that he exercised very little control over the two accused as far as the use of the lorry was concerned. According to him accused No. 1 and No. 3 decided when a trip to Singapore was necessary and they could go down to Singapore in the lorry without his permission. In my view this was a fit and proper case to order the forfeiture of the lorry under Section 17(1) of the Proclamation and made an order accordingly. This confiscation would act as a deterrent to other owners of lorries so that they would exercise proper control over their employees and prevent the use of their lorries for illegal purposes."

Mr. Rintoul drew my attention to the case of *Cheng Kee Huat & Anor. v. Public Prosecutor*⁽³⁾. There Russell, J. found no dereliction of duty by the owner of the car (incidentally he was a party to that case), and went on to say forfeiture of the property of a completely innocent person could not act as deterrent to wrong-doers.

But I could by no means go so far in this case and assert that the owner is a completely innocent person. He asked the Court below to believe that although he constructed the lorry (lines 222-225) and formerly drove it, he did not know of the secret partition in the lockers—neither according to the record would the 1st nor 2nd appellant admit such knowledge until the lorry was stopped at Merlimau on the 2nd October, 1948.

If these proceedings had been under section 179 of the Customs Consolidated Act, 1876, and a boat involved instead of a lorry, the mere existence of a cunningly devised hiding place such as those in the lockers of this lorry (Exhibit P. 1) would be sufficient for mandatory forfeiture.

However, justice must not only be done, but appear to be done, and I do not think it readily appears to have been done if forfeiture is ordered against a person not a party to the particular case, and so without affording him a direct and unequivocal opportunity to show cause.

I can find no close precedent, but in *Tan Lian v. Rex*⁽⁴⁾ Murray-Aynsley, C.J., said:—

"Before exercising this power of forfeiture the Court should, where it is practicable, give the owner of the property concerned an opportunity of showing cause why the order should not be made."

It is true that that judgment is from an appeal against forfeiture consequent upon an Essential Regulation contravention, but the principle is fair and I follow it.

To summarise my findings, the appeal of the 1st appellant as regards conviction and sentence is dismissed. The appeal of the 2nd appellant is allowed and he is acquitted and discharged. The present order of forfeiture of the lorry is set aside, but the seizure remains and the owner is to be afforded opportunity to appear before the Court below to show cause why the lorry should not be forfeited in accordance with the provisions of section 17(1) of the Opium and Chandu Proclamation. Due notice should be served upon the owner (section 17(2) of the said Proclamation), and if no appearance is entered within 14 days of the service of the notice the lorry *shall* be forfeited.

The confiscation of the opium is confirmed.

Order accordingly.

SULTAN OF JOHORE v. TUNGKU ABUBAKAR & ORS.

[Privy Council (Viscount Simon, Lord Porter,
Lord Oaksey, Lord Radcliff, Sir Alfred Bucknill)
April 22, 1952]

[Privy Council Appeal No. 45 of 1950]

*Conflict of laws—Immunity of Sovereign—
Waiver by submission to jurisdiction—Continuation of
proceedings by way of appeal—Japanese Judgments
and Civil Proceedings Ordinance, 1946, s. 3.*

During the Japanese Occupation the Sultan of Johore applied to a Japanese constituted Court to set aside a settlement of land in Singapore; the Court found in his favour. After the re-occupation the respondents, claiming to be aggrieved by this order, applied to the High Court of Singapore under section 3 of the Japanese Judgments and Civil Proceedings Ordinance, 1946 to set aside the decree, alternatively to appeal against it. The Sultan applied for a stay of the proceedings on the ground that he was a sovereign ruler. The Summons in Chambers which was adjourned in open Court for argument in which it was sought to set aside an Originating Summons on the ground that the Court had no jurisdiction over the appellant who is a sovereign ruler was heard by Gordon-Smith, J., and his Lordship's decision is reported in (1949) M.L.J. 187. The Sultan appealed to the Court of Appeal and the appeal was dismissed. The decision of the Court of Appeal is reported in (1950) M.L.J. 3. On appeal to the Privy Council,—

Held, that (1) the Secretary of State having certified the Sultan was a foreign sovereign the matter must be considered conclusive; (2) nevertheless, as he had himself instituted proceedings in the Japanese Court and the present one was in the nature of an appeal, he having waived his immunity could not object to being made a respondent; his original submission bound him to accept the jurisdiction on appeal. The present proceedings were to determine whether the Japanese Court was right or wrong; and (3) it was not necessary to determine whether the immunity of a sovereign who had waived